78-1609

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1978

No. 78-1565

BENJAMIN L. GOINS,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

PETITION FOR A WRIT OF CERTIORARI
To the United States Court of Appeals
for the Eighth Circuit

DANIEL P. REARDON, JR.
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Petitioner, Benjamin L. Goins, respectfully prays that a writ of certiorari be issued to review the judgment and opinion of the United States Court of Appeals for the Eighth Circuit, No. 78-1565.

OPINION BELOW

The opinion of the Court of Appeals is not yet reported and is reprinted as Appendix A.

JURISDICTION

The judgment of the Court of Appeals was entered on February 26, 1979. A timely motion for rehearing or transfer en banc was denied on March 21, 1979. This court's jurisdiction is invoked under 28 U.S.C. § 1254(1).

QUESTION PRESENTED

May certain statements against penal interest made by an unavailable, unindicted co-conspirator inculpating the Petitioner overcome his Constitutional objection as a denial of confrontation and be admitted into evidence pursuant to Federal Rules of Evidence 804(b)(3)?

UNITED STATES CONSTITUTION, STATUTES AND RULES INVOLVED

United States Constitution, Amendment Six

Rule 804(b)(3) Fed. R. Evid.

STATEMENT OF THE CASE

At the time of his indictment (April, 1978), and his conviction (June, 1978), Benjamin L. Goins was the Sheriff of the City of St. Louis. At the times pertinent to the proceedings herein, Mr. Goins was the License Collector for the City of St. Louis. While License Collector for the City of St. Louis, an elective office, among the responsibilities vested in Goins was the enforcement and collection of local cigarette taxes. In the initial count of the indictment against Goins, it was alleged that in violation of 18 U.S. Code, § 1962a and 1963, he derived certain substantial sums of money from one Raymond Scharf, a wholesale cigarette distributor in permitting him to circumvent the payment of cigarette taxes. In turn, Goins invested the ill-gotten funds in a concealed interest in The Piece of the Rock coctail lounge operated by one Joyce Harlston. The second and third counts of the Indictment against the Petitioner allege that on March 3, 1977, Goins had testified falsely before a United States Grand Jury that was inquiring of his relationship with Mr. Scharf and Joyce Harlston, and alleges a violation of 18 U.S. Code §1623. Further, in Count III, it was alleged that on the same date, March 3, Goins had violated 18 U.S. Code § 1503 in counseling Joyce Harlston to give false testimony before the same United States Grand Jury. These offenses occurred during a concerted United States investigation of the operation of the License Collector's office during Petitioner's tenure in office.

The final three counts of the indictment returned against Petitioner charged Goins with fail-

ing to declare as taxable income monies received from Scharf and the Harlston tavern operation in the years 1973, 1974, and 1975, all contrary to the requirements of 26 U.S. Code §7206(1). Petitioner has been found guilty in all six counts.

Evidence, characterized by the United States Court of Appeals for the Eighth Circuit as overwhelming, was presented to the triers of fact that Goins had received monies from Raymond Scharf for permitting him to sell unstamped cigarettes within the territorial confines of the City of St. Louis. Part of these funds obtained by Goins were used to finance his hidden interest in the tavern operated by Joyce Harlston. Mr. Scharf appeared as a witness for the United States under a grant of immunity. At the time of his testimony Scharf was serving sentences in a United States penal institution for various tax and extortion offenses. After the return of the indictment and prior to the trial of this cause, Joyce Harlston died. Her death gives rise to the questions that are presented to this Honorable Court. In a certificate of death issued by the State of California, it was revealed that Joyce Harlston died on May 26, 1978. At the time of her death she was an employee of the Department of Justice, and had been so occupied for a two year term according to the certificate.

In a terrifyingly circumspect fashion, the Government utilized many alleged conversations engaged in by Joyce Harlston during her association with the Petitioner. Many of these statements were clearly in furtherance of one claimed conspiracy or another, none of which were alleged in the cleverly drafted indictment. Many of these statements are

not the subject matter of this petition. However, certain unmistakably prejudicial remarks allegedly made by Mrs. Harlston are questioned herein. These statements were made to her daughter, Veronica Raiford and two male acquaintences, Samuel Davis and Gregory Hawkins.

In August, 1975, Joyce Harlston's operation of the Piece of the Rock tavern was being investigated by the Internal Revenue. Agent John Palazzolo reviewed Harlston's tax problems for the jury. (Tr. 875-888). Harlston had not filed a tax return for the year 1974 while the coctail lounge grossed some $86,000. She failed to keep appointments with the tax agent who eventually determined the taxable income at the Piece of the Rock for 1974 to be $26,052. The tax owing, agreed to by Mrs. Harlston was at least $6,000. (Tr. 879).

While beset with this financial concern during the summer of 1975, Mrs. Harlston was keeping company with one Samuel Davis, Jr. Davis, a part-time Baptist minister and, during times pertinent herein, a laid-off assembly worker of the Ford Motor Company, helped Harlston in operating the Piece of the Rock. Davis was aware of her efforts to avoid the Internal Revenue Agent. Davis asserted that Joyce Harlston informed him that she was having trouble over missing money that was given Ben, the Petitioner. She informed Davis that somewhere between sixteen and seventeen thousand dollars had been given Ben. (Tr. 908).

By January of 1976, Harlston's activities with regard to the Piece of the Rock had come to the attention of a United States Grand Jury that required her

attendance as a witness. Her daughter, Veronica Raiford, indicated that she had accompanied her mother to the Grand Jury hearing and that while there her mother had testified that Goins had no financial interest in the Piece of the Rock tavern, and had falsely indicated that her step-grandmother had left her money used in opening the lounge. (Tr. 790).

Gregory Hawkins, a St. Louis Police officer who was assigned the duties of a narcotics detective, enjoyed what he described as just a friendship with Mrs. Harlston. He frequently assisted her in closing the lounge at night and escorting her home. Mrs. Harlston contacted him with regard to an Internal Revenue Service summons in July or August of 1976. The summons commanded information with regard to Petitioner Goins. (Tr. 1045). Harlston told Hawkins she needed a receipt from Goins for $8,000 he had received. She further told Hawkins that she had lied before a Federal Grand Jury telling that Jury what Benjamin Goins had told her to tell them. (Tr. 1046, 1047).

On September 4, 1976, Joyce Harlston gave a full and complete sworn statement to two Special Agents of the Internal Revenue Service, Robert C. Breitbarth and Richard W. Carr. The statement was obtained in her home in the presence of Detective Gregory Hawkins. At or about this time, Joyce Harlston became an employee of the United States Government. She remained in the St. Louis area and supplied the United States with a number of recorded statements obtained from Mr. Goins including the statement and the meeting dated March 3, 1977, that lead to the conviction in Count

III. Immediately following the recorded conversation between Goins and Harlston on March 3, 1977, while Goins was under the mistaken belief that Joyce Harlston was to appear before a United States Grand Jury, she was escorted to the airport and thereafter given a residence on the west coast in the San Francisco-Oakland area under the last name of Corves.

The damaging testimony allegedly from the lips of Mrs. Harlston that she had lied before a United States Grand Jury for the Petitioner, was admitted into evidence by the trial court pursuant to Federal Rules of Evidence 804(b)(3). The remarks attributed to Harlston by Davis were permitted as made in furtherance of an unalleged conspiracy. Federal Rules of Evidence 801(d)(2)(E).

REASONS WHY THE WRIT SHOULD BE GRANTED

I

May certain statements against penal interest made by an unavailable, unindicted co-conspirator inculpating the Petitioner overcome his Constitutional objection as a denial of confrontation and be admitted into evidence pursuant to Federal Rules of Evidence 804(b)(3)?

From an investigatory standpoint, the Federal Grand Jury investigation of Petitioner Goins took two decisive steps that enabled the United States to gather sufficient evidence with which to proceed against him.

The first step consisted in the Government's successful prosecution and eventual incarceration of Raymond Scharf. After his incarceration Scharf looked for ways to reduce his sentence via a Rule 35 Motion. He was granted immunity and testified against Petitioner while still looking for help in the sentence reduction process.

The second decisive step, in so far as the Petitioner is concerned, took place on September 4, 1976. On that date, Mrs. Joyce Harlston gave a detailed sworn statement to Internal Revenue Agents that had been investigating her activities in the operation of the Piece of the Rock coctail lounge. At that time or shortly thereafter she became employed by the Department of Justice, became a paid Government witness and a participant in the witness relocation program. While so employed, she recorded various and sundry conversations engaged in with the Petitioner. This mission was completed on March 3, 1977, and she was relocated in the San Francisco, California area under an assumed name. Prior to the trial of the Petitioner, Mrs. Harlston died. As a consequence of her death the Government was permitted to utilize a great deal of what she had allegedly had to say during the period of time she was associated with the Petitioner. Certain of these alleged statements formulate the basis of the Petitioner's assertion that he has been denied the right of confrontation in the trial of this cause in violation of the Sixth Amendment to the Constitution of the United States which provides:

> "In all criminal prosecutions, the accused shall enjoy . . . to be confronted with the witnesses against him."

The United States Court of Appeals has dealt with this assertion made by the Petitioner in a brusque fashion. It has equated the Petitioner's claimed Constitutional error with that asserted in the United States v. Scholle, 553 F. 2d 1109, wherein the Eighth Circuit had approved the admission into evidence an extrajudicial statement made by a co-conspirator in furtherance of the conspiracy. In so holding the Court relied upon this Honorable Court's decision in Dutton v. Evans, 400 U.S. 74. Such a conclusion is certainly understandable due to the volume of testimony that was admitted into evidence pursuant to one hearsay exception or another pursuant to the Federal Rules of Evidence. However, Petitioner Goins' constitutional complaint is more narrowly drawn than the attention it has received in the Court of Appeals.

Two terribly prejudicial remarks were permitted that allegedly came from the lips of Joyce Harlston. First, to her daughter when she supposedly discussed her appearance before a United States Grand Jury in January of 1976, and secondly, a statement made to a narcotics detective of the St. Louis Police Department in August of 1976 that she had lied before a United States Grand Jury for Benny. These statements were admitted into evidence pursuant to § 804(b)(3) Federal Rules of Evidence.

It is therefore clear that the Eighth Circuit's reliance on its Scholle opinion which in turn rests upon Dutton v. Evans, supra, is indeed misplaced.

In Dutton v. Evans this Honorable Court stated,

> "The decisions of this Court make it clear that the mission of the confrontation clause is to advance a practical concern for the accuracy of the truth determining process in criminal trials by assuring that 'the trier of fact has a satisfactory basis for evaluating the truth of the prior statement.'" at page 89.

In this case, the trier of fact could not evaluate validly these two statements of Joyce Harlston. At the time Harlston made the statements to Detective Hawkins she had found herself pursued by the Federal Bureau of Investigation, significantly in debt to the Internal Revenue Service and flustered by the refusal of the Petitioner to bail her out financially. Shortly after the remarks were made to Detective Hawkins, Mrs. Harlston found herself in the company of the IRS Agents on September 4, 1976, and thereafter enrolled in the witness protection program. The pursuit of her financially by the Internal Revenue was clearly terminated and her potential criminal liability so absolved that she was not even mentioned as an unindicted co-conspirator in the accusation returned against Petitioner. Mrs. Harlston's death denied the trier of fact access to these potent influencing factors. Yet, the Government was permitted, through its witnesses, to parade the most damaging facts for the jurors.

While the United States Court of Appeals has equated these remarks with those approved in the Scholle decision, the Petitioner urges that this reliance is erroneous. The distinction is clearly set

forth in 4 Weinstein's Evidence 804(b)(3), 804-93,

> "Particularly troublesome is the problem of inculpating statements against penal interests inculpating the accused. Since they are offered against the accused, and by definition declarant is unavailable, confrontation questions arise. Since they are made by someone subject to criminal prosecution, the possibility exists, especially when the statement is made in police custody, that declarant is seeking immunity or hopes to be allowed to plead to a lesser crime, in return for his help to the prosecution in obtaining a conviction. Cross-examination in such instances is particularly important and is usually quite extensive. Generally, the Defendant is entitled to a charge with respect to the particular care that needs to be taken in evaluating such accomplice testimony."

Needless to say, Joyce Harlston certainly alevi-ated her financial and criminal liabilities on September 4, 1976. Her unavailability at trial denied cross examination on this critical issue in the determination of her credibility. Weinstein's words speak for themselves, page 804-95,

> "A number of commentators including Wigmore, have analogized the inculpatory confession to a statemnt which has both self-serving and disserving aspects and have concluded that the rationale for the exception for statements against interests is lacking for that part of the declarant's statement inculpating an accomplice. Other commentators have looked at the 'inherent untrustworthiness' of inculpatory statements and have suggested that the danger to an accused is so high that blanket exclusion of all such statements is warranted." (Footnote deleted).

Other Circuits have viewed the constitutional position asserted by the Petitioner herein in a more compatible fashion. In United States v. Bailey, 581 F. 2d 341, (3d Cir.), a co-conspirator's confession was not considered admissible as a declaration against penal interests pursuant to Federal Rules of Evidence 804(b)(3). In the Bailey case, the declarant was bargaining for himself at the time the statement was uttered. Clearly, in the case at bar, Mrs. Harlston was in the process of or had already bargained successfully for herself as we find no evidence of the Internal Revenue's pursuit of her tax liability. Most importantly, the indictment returned against Petitioner exemplifies the Government's motives in failing to even mention Harlston as an unindicted co-conspirator.

Joyce Harlston struck a fantastic deal for herself at Petitioner's expense. All he asks is the right to examine her on the subject and asserts that the Sixth Amendment preserves this right.

A helpful opinion can be found in United States v. Gonzalez, 559 F. 2d 1271 (5th Cir.). The Fifth Circuit would not admit into evidence under 804(b)(3), as a statement against interest, the confession

of a co-conspirator made before a United States Grand Jury after the co-conspirator had been grant granted immunity. In the case at bar, Mrs. Harlston gave the statement to Hawkins while in the process of or warming up for her 'co-operative' role.

The statement given to her daughter Veronica in January 1976 must be understood as having been obtained by the Government after it had rewarded her mother. Knowledge of that reward, both civil and criminal, certainly enrolled Veronica as a charter member of the home team in the Goins prosecution.

United States v. Brandenfels, 522 F. 2d 1259, expresses with citations the Ninth Circuit's views with respect to statements whose admissibility relied upon 804(b)(3). Their exclusion from evidence finds substance in, not only Weinstein's treatise, but in selected decisions.

Finally, the Petitioner wished to draw this Honorable Court's attention to statements attributed to Joyce Harlston by her 'summer of '75' male associate, Samuel Davis, Jr. These statements were permitted as having been made in the furtherance of a conspiracy and therefore available to the Government pursuant to Federal Rules of Evidence 801(d) 2(e). Harlston at the time was avoiding the IRS. She allegedly informed Davis that the problem she had was accounting for money given Petitioner Goins. It is terribly difficult to understand how this disclosure was in furtherance of any conspiracy with Goins. It is clearly not a disclosure against interest. It was however permitted as the evidence assisted the Government materially in showing that Petitioner Goins had cheated Harlston, Scharf, and the United States! There must be some Federal Rule allowing such a disclosure without the test of cross examination. The Petitioner asserts that the admission of these particular portions of Davis' testimony into evidence deprived him of the right of confrontation.

By way of conslusion, Petitioner wishes to assert that the trier of fact did not have a fair basis for evaluating the words of Joyce Harlston as they were presented by the Government. Her words, as reiterated by her daughter and two male associates, were insurmountable . . . insulated from attack by cross examination. The clear mission of the Confrontation Clause is to advance a practical concern for the accuracy of the truth-determining process in criminal trials. This Honorable Court has been vigilant in achieving this goal. It can not let stand the denial of confrontation that has taken place herein. The Petitioner was helpless in the face of the alleged assertions of a decedent. Can his dilemma truthfully be delineated from the fate that befell George William Bruton? Bruton v. United States, 391 U.S. 123.

CONCLUSION

Petitioner respectfully requests that a writ of certiorari be issued to review the Constitutional question of the denial of confrontation that occurred

in the admission into evidence under hearsay exceptions statements attributed to a deceased unindicted co-conspirator.

Respectfully submitted,

DANIEL P. REARDON, JR.
1108 Olive Street
St. Louis Missouri
Attorney for Petitioner

April 18, 1979

Certificate of Service

I hereby certify that on this 18th day of April, 1979, three copies of the Petition for Writ of Certiorari were mailed to the Honorable Wade H. McCree, Solicitor General, c/o The United States Department of Justice, Washington, D. C.; and a copy was mailed to the United States Attorney for the Eastern District of Missouri, U. S. Court & Customhouse, 1114 Market Street, St. Louis, Missouri.

DANIEL P. REARDON, JR.
1108 Olive Street
St. Louis, Missouri

APPENDIX A

United States Court of Appeals
for the Eighth Circuit

No. 78-1565

United States of America, *
*
Appellee, * Appeal From the
* United States Dis-
v. * trict Court for the
* Eastern District
Benjamin L. Goins, * of Missouri.
*
Appellant. *

Submitted: December 11, 1978
Filed: February 26, 1979

Before GIBSON, Chief Judge, BRIGHT and HENLEY Circuit Judges.

GIBSON, Chief Judge.

After trial by jury, Benjamin L. Goins stands convicted of six counts of an indictment returned by a federal grand jury in St. Louis, Missouri. He appeals, contending that the admission into evidence of out-of-court statements made by Joyce Harlston was in contravention of the Federal Rules of Evidence and denied him the right of confrontation guaranteed by the Sixth Amendment. After a careful review of the record and the briefs and arguments of the parties, we affirm the District Court. [1]

From 1968 until 1977, Benjamin L. Gins was the License Collector for the City of St. Louis, an elective office. [2] The License Collector's duties entailed collecting cigarette taxes of six cents per pack and enforcing city licensing laws. The cigarette tax was collected through wholesale suppliers who affixed a stamp to each pack offered for sale in St. Louis. Retail distributors would then purchase stamped packs for sale. The tax was enforced by city criminal sanctions against those who sold unstamped cigarettes within the city. The vending machine tax was collected through the sale of stickers to be affixed to machines used in the city. The vending tax was enforced, in part by seizure of machines lacking city license stickers.

Overwhelming evidence was presented by the Government that Goins accepted bribes from Raymond L. Scharf and in return Goins permitted Scharf to sell unstamped cigarettes in unlicensed vending machines throughout the City of St. Louis. Goins used the funds received from Scharf in part to finance the concealed purchase of a tavern that was then operated by Joyce Harlston. These facts provided the basis for Count I of the indictment which charged Goins with racketerring in violation of 18 U.S.C. §§ 1962(a) and 1963.

The second and third counts related to the grand jury investigation of the foregoing events. Count II charged that Goins violated 18 U.S.C. § 1623 by testifying falsely before the grand jury on March 3, 1977. Count III charged that Goins violated 18 U.S.C. § 1503 on March 3, 1977, by counseling Joyce Harlston to give false and misleading testimony before the grand jury.

The remaining counts alleged criminal violation of the internal revenue laws. Those charged that Goins failed to declare taxable income received as bribes from Scharf and from Joyce Harlston's tavern operation in the years 1973, 1974, and 1975, contrary to the requirements of 26 U.S.C. § 7206(1).

The trial of Goins on the six-count indictment was scheduled to begin on June 12, 1978. On May 26, 1978, Joyce Harlston died; despite this the trial began on schedule and concluded on June 24. Goins was convicted on all six counts and on July 14, 1978, he was sentenced.[4] This appeal followed.

The record discloses that Goins received $34,000 in bribery income of which $15,000 was invested in the tavern operation of Joyce Harlston called Piece of the Rock in which Goins was a silent or concealed partner, that Goins testified falsely to the grand jury about his connection with the tavern operation, and that Goins encouraged Joyce Harlston to give false testimony to the grand jury. Also, Goins failed to pay income tax on any of the bribery income and apparently on any income received from the tavern operation.

Goins' sole contention on appeal is that the admission into evidence of out-of-court statements made by Joyce Harlston was in violation of the Federal Rules of Evidence and the confrontation clause of the Sixth Amendment. Since Harlston had died, her statements were introduced by the testimony of other witnesses. We will first consider the evidentiary claim before reaching the constitutional challenge.

Goins contends that the evidence of statements made by Joyce Harlston was hearsay not falling within recognized exceptions to the hearsay rule as admissible for reasons based on the trustworthiness of the statements. We have carefully considered the written and oral arguments made by Goins' counsel as well as those advanced on behalf of the Government. After doing so it is apparent from the record that the statements of Joyce Harlston were properly admitted under the Federal Rules of Evidence. Goins' objections, however, to some items of testimony merit analysis and consideration in this opinion.

Goins challenges the admission of the testimony of Joyce Harlston's daughter and Gregory Hawkins concerning Harlston's statements regarding her testimony before the grand jury. In these statements Harlson stated that she had lied. The Government supports the admission of this testimony as reflecting declarations against penal interest. FED. R. EVID. 804(b)(3).[5] Goins' only objection to this testimony is based on his view that the making of statements to the declarant's daughter and off-duty policeman fried does not subject the declarant to criminal liability in a real and tangible way, citing United States v. Hoyos, 573 F.2d 1111, 1115 (9th Cir. 1978). Actually, the Hoyos opinion supports the District Court ruling in the present case. It notes that the admission of such declarations is within the discretion of the trial court. It is also clear from Hoyos as well as our own cases that the identity of the party to whom the statement was made is only one of several factors under Fed. R. Evid. 804(b)(3). The rule states the ultimate question as whether "a reasonable man in [the declarant's] position

would not have made the statement unless he believed it to be true." Applying that test, there is no reason to doubt the truth of the declarations. The District Court did not abuse its discretion under the Federal Rules of Evidence in admitting this declaration acknowledging the declarant's commission of a criminal act to her daughter. Acknowledgment of criminal activity is generally made only to confidants or to persons in whom the declarant imposes trust.

Goins also contends that a statement made by Joyce Harlston when attempting to lease an automobile should have been excluded. The record reveals that at the time Goins admitted that the car would be used by Harlston for business and that she was his business associate or partner. Under these circumstances we do not find that hearsay was involved. The statements were properly admitted pursuant to Fed. R. Evid. 801(d)(2)(A), (B), and (E).[6]

Goins asserts prejudice in the admission of a memorandum compiled by Harlston with the assistance of her daughter, Veronica Raiford, listing payments made to Goins from the proceeds of the tavern operation. Under Fed. R. Evid. 803(6),[7] any regularly recorded memorandum made in the routine course of business is admissible to show the occurrence of a particular act or event. The memorandum supplied, noting payments made to Goins by Joyce Harlston, is such a record and substantiates payments of funds from the tavern operation to Goins in the amounts listed. The trial court has broad discretion to determine the admissibility of business records and the admittance of this record fell well within the District Court's

discretion. United States v. Page, 544 F. 2d 982, 987 (8th Cir. 1976); United States v. Pfeiffer, 539 F. 2d 668, 671 (8th Cir. 1976).

In similar fashion several of the remaining statements to which Goins objects were admissions under the subparts of Fed. R. Evid. 801(d)(2).[8] Other statements by Joyce Harlston were declarations against her interest. Goins has failed to establish any error under the Federal Rules of Evidence.

Despite the correctness of the evidentiary rulings, Goins contends that admission of out-of-court statements of Joyce Harlston violated his right of confrontation guaranteed by the Sixth Amendment. Goins cites Dutton v. Evans, 400 U.S. 74 (1970); Bruton v. United States, 391 U.S. 123 (1968); and Krulewitch v. United States, 336 U.S. 440 (1949), in support of his constitutional claim. The Bruton rule precludes inadmissible hearsay against the accused, but not all extra-judicial statements are precluded under the confrontation clause. Statements of co-conspirators, as was Joyce Harlston, in conspiring with Goins to conceal his interest in the tavern operation and to evade payment of taxes on the money generated from the tavern operation by concealing Goins' interest in and the investment of some of the bribery proceeds in that operation, would be admissible under the general rule of co-conspirators' statements made in furtherance of the conspiracy. Harlston also conspired with Goins to thwart the grand jury investigation by giving false testimony regarding the source of funds for the tavern operation and Goins' interest in the tavern. This court has previously held that when out-of-court state-

ments are properly admitted under an exception to the hearsay rule, Dutton v. Evans, 400 U.S. 74 (1970), applies. A case-by-case analysis is required. United States v. Scholle, 553 F.2d 1109, 1119 (8th Cir.), cert. denied, 434 U.S. 940 (1977). As we stated there:

> A highly relevant consideration is the degree of prejudice imposed upon the fact-finding process by the declarant's non-availability. We should consider whether the out-of-court statement bears traditional indicia of reliability, whether it was crucial to the government's case, whether the jury had an opportunity to weigh the credibility of the extrajudicial statement, and whether appropriate instructions were given by the trial judge.
>
> In adhering to these principles, this court has held that the Bruton rule is not violated and an accused's right of confrontation is not abridged when the extrajudicial statement of a co-defendant is properly admitted as a declaration by a co-conspirator in the course of and in furtherance of the conspiracy, provided the statement satisfies the standards set forth above.

553 F.2d 1109, 1119-20 (citations omitted).

Applying these principles we conclude that Goins' right of confrontation was not denied by the admission of out-of-court statements of Joyce Harlston. In each case the context of the statement and

the identity of the person spoken to supported the reliability of the statement. No motive for lying by Harlston in the out-of-court statements has been shown. No problem of memory, perception, or expression is indicated. We also note that much of the content of the statements was reinforced by other evidence including admissions made by Goins and documents he signed. The keystone of the prosecution, Count I dealing with Goins' receipt of bribes, was established by the testimony of Scharf, the man who paid the bribes. The other counts were also established by evidence other than Harlston's statements. In these circumstances, the out-of-court statements with clear indicia of reliability were properly admitted to enhance the truth-finding function of the trial.

Judgment affirmed.

A true copy.

Attest:

CLERK, U.S. COURT OF APPEALS,
EIGHTH CIRCUIT.

FOOTNOTES

[1]The Honorable John F. Nangle, United States District Judge, Eastern District of Missouri

[2]At the time of his indictment, Goins was serving as the elected sheriff of the City of St. Louis.

[3]The record shows that Scharf had cigarette vending machines in approximately 180 locations in the City of St. Louis for which he purchased the following amounts of city-taxed cigarettes: 31,882 cartons in 1972, 15,427 cartons in 1973, only 146 cartons in 1974, and 25,197 cartons in 1975.

In 1976 Scharf was convicted of failure to pay withholding tax in violation of 26 U.S.C. § 7202 and subsequently that same year pleaded guilty to conspiracy to interfere with interstate commerce in violation of 18 U.S.C. § 1951. He received a ten-year concurrent sentence on each conviction.

[4]On Count I, Goins was sentenced to five years imprisonment and fined $3,000. On Count II Goins was sentenced to one year's imprisonment and fined $1,000. On Count III, Goins was sentenced to one year's imprisonment and fined $1,000. On each of Counts IV, V, and VI, Goins was fined $1,000 and received a suspended sentence of one year's imprisonment with five years' probation. The prison terms on Counts I, II, and III were stated to be consecutive and to followed by the five-year period of probation. The overall judgments resulted in a seven-year sentence, fines of $8,000, and five year's probation.

[5]Fed. R. Evid. 804 (b) (3) states:

[5]Continued:

> (b) Hearsay exceptions. --The following are not excluded by the hearsay rule if the declarant is unavailable as a witness:
>
> (3) Statement against interest. --A statement which was at the time of its making so far contrary to the declarant's pecuniary or proprietary interest, or so far tended to subject him to civil or criminal liability, or to render invalid a claim by him against another, that a reasonable man in his position would not have made the statement unless he believed it to be true. A statement tending to expose the declarant to criminal liability and offered to exculpate the accused is not admissible unless corroborating circumstances clearly indicate the trustworthiness of the statement.

[6]Fed. R. Evid. 801 (d) (2) (A), (B), and (E) states:

> The following definitions apply under this article:
>
> (d) Statements which are not hearsay. --A statement is not hearsay if--
>
> (2) Admission by party opponent. --The statement is offered against a party and is (A) his own statement, in either his individual or a representative capacity or (B) a statement of which he has manifested his adoption or belief in its truth, or * * * (E) a statement by a co-conspirator of a party during the course and in furtherance of the conspiracy.

[7]Fed. R. Evid. 803 provides in pertinent part:

[7]continued:

The following are not excluded by the hearsay rule, even though the declarant is available as a witness:

* * *

(6) Records of regularly conducted activity. -- A memorandum, report, record, or data compilation, in any form, of acts, events, conditions, opinions, or diagnoses, made at or near the time by, or from information transmitted by, a person with knowledge, if kept in the course of a regularly conducted business activity to make the memorandum, report, record, or data compilation, all as shown by the testimony of the custodian or other qualified witness, unless the source of information or the method or circumstances of preparation indicate lack of trustworthiness.

[8]Several of the statements were co-conspirator's admissions. The conspiracy that included Goins and Harlston was to defraud the United States and obstruct the collection of Goins' federal income tax. See rule quoted, note 6 supra.

No. 78-1609

In the Supreme Court of the United States

OCTOBER TERM, 1978

BENJAMIN L. GOINS, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the court of appeals (Pet. App. A) is reported at 593 F.2d 88.

JURISDICTION

The judgment of the court of appeals was entered on February 26, 1979, and a petition for rehearing was denied on March 21, 1979. The petition for a writ of certiorari was filed on April 20, 1979. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether the admission into evidence of out-of-court statements made by a declarant who was deceased at the time of trial violated the Federal Rules of Evidence or petitioner's constitutional right of confrontation.

STATEMENT

Following a jury trial in the United States District Court for the Eastern District of Missouri, petitioner was convicted of racketeering, in violation of 18 U.S.C. 1962(a) (Count One), testifying falsely before a grand jury, in violation of 18 U.S.C. 1623 (Count Two), soliciting false testimony before a grand jury, in violation of 18 U.S.C. 1503 (Count Three), and three counts of filing false income tax returns, in violation of 26 U.S.C. 7206(1) (Counts Four to Six). He was sentenced to consecutive prison terms of five years on Count One, one year on Count Two, and one year on Count Three, to be followed by five years' probation. On the other counts he was sentenced to concurrent terms of one year's imprisonment, which was suspended in favor of five years' probation. He was also fined $3,000 on Count One and $1,000 on each of the other five counts. The court of appeals affirmed (Pet. App. A-1 to A-11).

1. The evidence, the sufficiency of which is not disputed, is summarized in the opinion below (Pet. App. A-2 to A-3). It showed that petitioner was the License Collector for the City of St. Louis from 1968 until 1977. His duties included collecting cigarette stamp tax and license fees for cigarette vending machines (Tr. 201, 1274, 1280).[1] Petitioner accepted bribes from Raymond Scharf in return for permitting Scharf to sell unstamped cigarettes in unlicensed vending machines throughout St. Louis (Tr. 275-276, 279, 282-284, 405, 412-413, 437, 439, 453-454, 507). Petitioner used part of the funds received from Scharf to finance the concealed purchase of a cocktail lounge operated by Joyce Harlston (Tr. 960-962, 291-293; Gov. Exh. 8A). For the years 1973 to 1975 petitioner failed to pay income tax on any of the bribery income or on the income received from the cocktail lounge.

Thereafter, petitioner testified falsely before a federal grand jury that was investigating these matters. Petitioner also encouraged Harlston to give false and misleading testimony before the grand jury, advising her in the presence of her daughter to conceal his interest in the cocktail lounge and to claim that the money used to open the cocktail lounge had been left to her by a deceased relative (Tr. 969-970).

2. Veronica Harlston Raiford (Harlston's daughter), Samuel Davis (an employee at Harlston's cocktail lounge) and Gregory Hawkins (a police officer and Harlston's friend) were among the more than 50 government witnesses at petitioner's trial.

Raiford testified about the advice that she heard petitioner give her mother prior to the grand jury appearance. Raiford also said that her mother had told her that she had testified falsely before the grand

[1] "Tr." refers to the trial transcript; "H. Tr." refers to the hearing on petitioner's motion to suppress.

jury about the source of the financing for the lounge and had concealed petitioner's interest in the lounge (Tr. 970). Davis testified that in the summer of 1975, after the Internal Revenue Service had begun to audit the books of the cocktail lounge, Harlston told petitioner in Davis's presence that she needed a receipt of some sort for the $16,000-$17,000 that she had paid petitioner. Davis also stated that Harlston had mentioned the same subject to him before the meeting with petitioner (Tr. 905, 908-909). Hawkins testified that in the summer of 1976, after the IRS had subpoenaed records pertaining to the operation of the lounge, Harlston admitted to him that she had lied before the grand jury at petitioner's behest (Tr. 1046-1047).[2]

The government also introduced taped conversations recorded with the consent of Harlston, who began to cooperate in the government's investigation in September 1976. In these recorded conversations petitioner admitted his receipt of money from Scharf, his investment in the cocktail lounge and efforts to conceal his interest, and his own perjury before the grand jury (H. Tr. 21-30; Tr. 1058-1070; Gov. Exhs. 41-45). Harlston was to have been a government witness at petitioner's trial, but she died less than three weeks before the trial began.

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[2] Petitioner did not object to this testimony during Hawkins' direct examination (Tr. 1042-1047).

ARGUMENT

Petitioner's sole contention is that the introduction of the out-of-court statements made by Harlston to her daughter, to Davis, and to Hawkins violated both the Federal Rules of Evidence and his Sixth Amendment right of confrontation.

We note at the outset that, even if these statements were improperly admitted at trial, the error was harmless beyond a reasonable doubt. As noted above, Davis testified that, after Harlston had told him about the tax problem occasioned by the payments to petitioner, he met with both Harlston and petitioner to discuss the matter. The incriminating statements made by petitioner at this meeting were plainly admissible (see Fed. R. Evid. 801(d)(2)(A)), and the prior conversation between Harlston and Davis on the same subject was thus merely cumulative. Similarly, Harlston's statements to her daughter and Hawkins that she had lied before the grand jury did not add substantially to petitioner's admissions in the tape recorded conversations or to the daughter's other testimony that she had overheard petitioner advise her mother to conceal his interest in the lounge.

In any event, Harlston's statements were properly admitted in the circumstances of this case.

1a. Harlston's statement to Davis regarding the payments to petitioner that had been concealed from the IRS was made during the course and in furtherance of a conspiracy to defraud the United States of income taxes. It was thus admissible under Fed. R. Evid. 801(d)(2)(E). *Anderson* v. *United States*,

417 U.S. 211, 218 (1974). Harlston made it clear to Davis that she did not want to reveal petitioner as the recipient of the funds (Tr. 905-909). Davis testified that he suggested having someone else simply declare the income and pay the taxes, but this solution was rejected (Tr. 910-911). Instead, petitioner, Harlston and Davis decided to obtain a receipt from Scharf showing that the money given to petitioner had been turned over to Scharf as repayment of a loan (Tr. 911). This evidence plainly supports the court of appeals' conclusion (Pet. App. A-6) that Harlston's statement to Davis was part of a conspiracy directed at obtaining his help in continuing the concealment from the IRS of petitioner's financial involvement in the cocktail lounge. See *United States* v. *Scholle*, 553 F.2d 1109, 1117-1118 (8th Cir.), cert. denied, 434 U.S. 940 (1977); *United States* v. *Smith*, 550 F.2d 277, 281-282 (5th Cir.), cert. denied, 434 U.S. 841 (1977); *United States* v. *Zamarripa*, 544 F.2d 978, 981-982 (8th Cir. 1976), cert. denied, 429 U.S. 1111 (1977); *United States* v. *Richardson*, 477 F.2d 1280, 1282-1283 (8th Cir.), cert. denied, 414 U.S. 843 (1973); *United States* v. *Williams*, 435 F.2d 642, 645 (9th Cir. 1970), cert. denied, 401 U.S. 995 (1971).[3]

[3] Narratives of past events offered as an integral part of the planning of future strategy in furtherance of a conspiracy fall within the co-conspirator exception to the hearsay rule. "A statement of one conspirator to another during the active course of a conspiracy, giving the full setting of an upset, with the purpose of getting reassurance or other help, does not cease to be in furtherance of the conspiracy because it contains a natural and pertinent reference to a past fact." *United States* v. *Pardo-Bolland*, 348 F.2d 316, 324-325 (2d Cir.), cert. denied, 382 U.S. 944 (1965). See *United States* v. *Haldeman*, 559 F.2d 31, 110-111 (D.C. Cir. 1976) (en banc), cert. denied, 431 U.S. 933 (1977); *United States* v. *James*, 510 F.2d 546, 549-550 (5th Cir.), cert. denied, 423 U.S. 855 (1975); *United States* v. *Manarite*, 448 F.2d 583, 590-591 (2d Cir.), cert. denied, 404 U.S. 947 (1971).

b. Harlston's remarks to her daughter and to Hawkins concerning her grand jury perjury were properly admitted as declarations against penal interest. Fed. R. Evid. 804(b)(3). Although petitioner emphasizes Harlston's eventual cooperation with the government and the favorable resolution of her potential criminal liability, he cites no evidence that she was even attempting to bargain with the government at the time she made the declarations in question. Harlston's statement to her daughter was made immediately after her grand jury appearance, and the similar admission to Hawkins occurred when she was seeking his advice about how to respond to an IRS subpoena. It was not until after Hawkins advised her to go to the authorities and tell the truth that Harlston approached the government and agreed to cooperate.

Harlston's obvious exposure to criminal charges at the time she made the statements, and her choice of a close friend and a relative as confidants, both indicate the trustworthiness of the declarations. As the court of appeals concluded (Pet. App. A-4 to A-5), the test of admissibility of such statements—whether the statement is so contrary to the declarant's interest

in avoiding criminal liability that a reasonable person in declarant's position would not have made the statement unless he believed it to be true—was satisfied here. See *United States* v. *Hoyos*, 573 F.2d 1111, 1115 (9th Cir. 1978); *United States* v. *Oropeza*, 564 F.2d 316, 324-325 (9th Cir. 1977), cert. denied, 434 U.S. 1080 (1978); *United States* v. *Bagley*, 537 F.2d 162, 165-167 (5th Cir. 1976), cert. denied, 429 U.S. 1075 (1977).[4]

Petitioner argues that the use of statements against penal interest inculpating the accused has been criticized by commentators, notably Judge Weinstein, as being inherently untrustworthy. 4 *Weinstein's Evidence* ¶ 804(b)(3)[03], at 804-93 to 804-95 (1978). Nevertheless, Rule 804(b)(3) unquestionably allows the use of such statements. See *United States* v. *Barrett*, 539 F.2d 244, 250 (1st Cir. 1976). The Advisory Committee Notes explain that declarations that implicate the accused may be included in the category of statements against interest, so long as they qualify as actually against the declarant's interest:

[4] A second requirement, that corroborating circumstances clearly indicate the trustworthiness of the statement, applies only to declarations exculpating the accused. Fed. R. Evid. 804(b)(3). See *United States* v. *White*, 553 F.2d 310, 313 & n.8 (2d Cir.), cert. denied, 431 U.S. 972 (1977). But see *United States* v. *Alvarez*, 584 F.2d 694, 701 (5th Cir. 1978). In any event, as we have noted, Harlston's statements were amply corroborated. Raiford was present when petitioner told Harlston what to say to the grand jury (Tr. 969-970), and the jury also heard tape recordings of petitioner's admissions of his efforts to frustrate the government's investigations (H. Tr. 21-30; Tr. 1058-1070; Gov. Exhs. 41-45).

> Whether a statement is in fact against interest must be determined from the circumstances of each case. Thus a statement admitting guilt and implicating another person, made while in custody, may well be motivated by a desire to curry favor with the authorities and hence fail to qualify as against interest. On the other hand, the same words spoken under different circumstances, *e.g.*, to an acquaintance, would have no difficulty in qualifying.

56 F.R.D. 183, 328 (1973). In the present case, as discussed above, the circumstances surrounding Harlston's statements make it quite unlikely that her remarks were actually self-serving and therefore untrustworthy.

Each of the decisions cited by petitioner merely illustrates that the admissibility of a declaration under Rule 804(b)(3) depends upon a case-by-case analysis of a number of factors.[5] In *United States* v. *Bailey*, 581 F.2d 341, 345 (3d Cir. 1978), the court refused to admit a statement implicating both the defendant and the declarant because the confession had been given while the declarant was in police custody and after he had been offered a plea bargain. Similarly, the statements held inadmissible in *United States* v. *Gonzalez*, 559 F.2d 1271, 1273 (5th Cir. 1977), had been made after the declarant had been convicted,

[5] Petitioner characterizes these cases as supporting his constitutional claim (Pet. 12). In fact, however, the decisions in all three cases cited (Pet. 12-13) rested on evidentiary grounds alone.

given immunity, and pressured to testify by both the prosecutor and the grand jury. The court concluded that in these circumstances the giving of the testimony was in the best interest of the witness, rather than against it. See also *United States* v. *Alvarez*, 584 F.2d 694, 701 (5th Cir. 1978). Here, by contrast, Harlston's statements were made to her daughter and a friend, not to government officials. She was not in police custody at the time, nor is there any indication in the record that she was attempting to strike a bargain with the government when she made her admissions. Harlston was still very much subject to criminal liability; her later decision to cooperate cannot serve to change her earlier state of mind.

Finally, contrary to petitioner's contentions (Pet. 13), *United States* v. *Brandenfels*, 522 F.2d 1259 (9th Cir.), cert. denied, 423 U.S. 1033 (1975), does not conflict with the instant case. Although in *Brandenfels* the Ninth Circuit reiterated its refusal to recognize the rule allowing admission of declarations against penal interest (522 F.2d at 1263), the court subsequently abandoned that position in light of the Federal Rules of Evidence and now leaves the determination of admissibility under Rule 804(b)(3) to the discretion of the trial court, subject to application of the proper test. *United States* v. *Hoyos*, *supra*, 573 F.2d at 1115; *United States* v. *Satterfield*, 572 F.2d 687, 690 (9th Cir.), cert. denied, No. 77-6600 (Oct. 2, 1978); *United States* v. *Oropeza*, *supra*, 564 F.2d at 325.[6]

In sum, petitioner does not dispute that the Federal Rules of Evidence allow the introduction of hearsay statements made in furtherance of a conspiracy or against penal interest. Although he asserts that Harlston's statements did not satisfy these exceptions for a number of reasons, the district court and the court of appeals rejected his claims. These essentially fact-bound determinations do not warrant further review.

2. Petitioner argues that the admission of Harlston's hearsay statements, even if consistent with the Federal Rules of Evidence, violated his Sixth Amendment right of confrontation.[7] Specifically, he claims

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[6] Moreover, *Brandenfels* was a case in which the statement—exculpating the accused—was not against the declarant's interest and was otherwise unreliable. 522 F.2d at 1264.

[7] The Confrontation Clause has never been construed to create an absolute bar to the admission of hearsay testimony by an unavailable declarant. See *Chambers* v. *Mississippi*, 410 U.S. 284, 295 (1973). As the Court noted in *Dutton* v. *Evans*, 400 U.S. 74, 89 (1970), "the mission of the Confrontation Clause is to advance a practical concern for the accuracy of the truth-determining process in criminal trials * * *." Hence, hearsay testimony is frequently introduced in the form of, *e.g.*, co-conspirator declarations, former testimony, dying declarations, and statements against interest, and although the defendant may be deprived of the opportunity literally to "confront" his accuser at trial, the constitutionality of admitting such evidence pursuant to recognized exceptions to the hearsay rule has repeatedly been upheld. See, *e.g.*, *Mattox* v. *United States*, 156 U.S. 237, 243 (1895); *Kirby* v. *United States*, 174 U.S. 47, 61 (1899); *Pointer* v. *Texas*, 380 U.S. 400, 407 (1965); *California* v. *Green*, 399 U.S. 149,

(Pet. 9-12) that the court of appeals erroneously relied on its previous decision in *United States* v. *Scholle*, *supra*, in its determination of the constitutional issue but that *Scholle* involved statements of a co-conspirator, not statements against penal interest inculpating the accused.

Petitioner's assertions are not supported by the record. The court of appeals relied on *Scholle* for its statement of the appropriate test to apply in assessing the constitutionality under the Confrontation Clause of any exception to the hearsay rule involving the out-of-court statement of an unavailable declarant (Pet. App. A-6 to A-7). That test, drawn from *Dutton* v. *Evans*, 400 U.S. 74 (1970), consists of an analysis of the circumstances surrounding the giving of the statement, with a focus on various factors that could affect the integrity of the fact-finding process, *e.g.*, whether the statement bears sufficient indicia of reliability, whether the evidence was crucial to the government's case, whether the jury had an adequate opportunity to weigh the credibility of the statement, and whether the trial court gave appropriate instructions. Pet. App. A-7, quoting *United States* v. *Scholle*, *supra*, 553 F.2d at 1119-1120. See also *United States* v. *Oates*, 560 F.2d 45, 81-83 (2d Cir. 1977); *United States* v. *Rogers*, 549 F.2d 490, 500-502 (8th Cir. 1976), cert. denied, 431 U.S. 918 (1977); *United States* v. *Baxter*, 492 F.2d 150, 177 (9th Cir. 1973), cert. denied, 416 U.S. 940 (1974).

165-168 (1970). See generally *McCormick on Evidence* § 252, at 606-607 (2d ed. 1972).

Applying this test, the court of appeals correctly found that the statements admitted here did not violate petitioner's Sixth Amendment right (Pet. App. A-7 to A-8). Harlston made all of the statements spontaneously to a close friend and a relative in whom she would be expected to confide and to whom she had no apparent reason to lie. See *Green* v. *Georgia*, No. 78-5944 (May 29, 1979). The statements could not have been based on faulty recollection or perception. Moreover, as the court below noted (Pet. App. A-8), the statements were amply corroborated by other evidence at trial and were not crucial to the case against petitioner. Scharf's testimony established the payment of the bribes, as well as petitioner's investment of those funds in the cocktail lounge, and this testimony was strongly confirmed by a number of witnesses and documents. Petitioner's own tape-recorded admissions also proved his concealed interest in the tavern, his false statements to the grand jury, and his encouragement of Harlston's perjury. In sum "[o]verwhelming evidence" (Pet. App. A-2) was offered at trial that petitioner accepted bribes from Scharf and used the money to purchase the lounge operated by Harlston. The jury thus had a substantial basis for assessing the credibility of Harlston's statements.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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